



Consisting of 240,000 acres on the Westside of the San Joaquin Valley

January 13, 2005

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Mr. Mark Gowdy
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

RE: *Draft Final Staff Report, Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins for the Control Program for Factors Contributing to the Dissolved Oxygen Impairment in the Stockton Deep Water Ship Channel (13 December 2004)*

Dear Mr. Gowdy:

The San Joaquin River Exchange Contractors Water Authority's (Exchange Contractors) letters, dated May 14, 2004 and June 24, 2004 regarding the proposed Basin Plan Amendments for the Control Program for Dissolved Oxygen Impairment in the Stockton Deep Water Ship Channel, have not been adequately addressed by the Regional Board staff. Although a few of the minor technical problems with the staff proposal have been remedied, all of the fundamental problems remain. Replacing the arbitrary 1/3, 1/3, 1/3 allocation of responsibility with an equally arbitrary 100%, 100%, 100% allocation of responsibility does not cure the logical and policy flaws of the proposed dissolved oxygen (DO) control program. Before allocating responsibility for the DO problem in the Stockton Deep Water Ship Channel (DWSC), staff and the Regional Board must explore and evaluate the reasons for the allocation of responsibility. For the reasons stated in our May 14, 2004 and June 24, 2004 letters, and those stated below, the Exchange Contractors urge the Regional Board to reject the staff report and proposed Basin Plan Amendments and work toward placing the responsibility for solving the problems caused by the Stockton Deep Water Ship Channel on the parties responsible for its artificial excavation.

Allocation of responsibility is based upon flawed logic and lacks meaningful policy analysis.

The basis for the proposed allocation of responsibility is fundamentally flawed. Staff observes that if any one of the three "contributing factors" were removed, the problem would be eliminated. Staff goes on to make the illogical leap that therefore each of the three "contributing factors" should be held equally

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responsible for solving the problem. The observation that the elimination of a particular factor would eliminate the problem does not support the conclusion that the factor should be held responsible for solving the problem. The use of this faulty reasoning will lead to ludicrous conclusions.

If a fire investigator were to use this reasoning in investigating a house fire he would arrive at a nonsensical determination. Fire is caused by three main "contributing factors." These factors are (1) Fuel, (2) Heat, and (3) Oxygen. If any one of these "contributing factors" were eliminated, the fire would be extinguished. In a hypothetical house fire, the house is the fuel. The heat comes from an arsonists match and the oxygen is supplied by the air. Using the logic of the DO TMDL, the house, the air, and the arsonist would all be held equally responsible for the fire. This conclusion is clearly erroneous. Another more sophisticated level of analysis must take place before one can arrive at a reasonable and just determination of responsibility. The house fire analogy is simplistic but it does demonstrate the fact that the logic used to allocate responsibility in the DO TMDL is flawed. A deeper level of analysis is necessary. The Board must not utilize this flawed logic to allocate responsibility for the DO problem in the DWSC.

Instead of using flawed logic or arbitrarily allocating responsibility for solving the DO problem in the DWSC, the Board must analyze the policy implications of the initial allocation of responsibility among the three "contributing factors". Additionally, the Board must analyze the policy rationale for the allocation of responsibility between point sources and non-point sources. Each of these determinations should be made with a thorough understanding of the policy reasons for the proposed allocation. The Exchange Contractors' letter dated June 24, 2004 discusses the issues in more detail on pages 4-6. The current staff proposal makes major policy choices regarding the division of DO responsibility without any meaningful policy analysis of those choices.

A thorough analysis of the policy implications would lead to the conclusion that agricultural discharges should not be held responsible for the DO problem created by the artificial excavation of the San Joaquin River. Many factors lead to the ultimate conclusion that agricultural interests upstream of the DWSC should not be held responsible for the DWSC's DO problem. These factors include:

- ◆ The lower San Joaquin River has contained naturally occurring algae for hundreds of years.
- ◆ Significant agricultural production has been in existence in the San Joaquin River watershed since the 1800's and the discharges from these farming activities have consistently contained nutrients sufficient to sustain algae growth in the River and adjoining sloughs.

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- ◆ Algae are a natural and necessary part of the food chain in the lower San Joaquin River. The ecosystem would be harmed by eliminating nutrients and algae in the River.
- ◆ There is not a low DO problem in the San Joaquin River upstream of the DWSC.
- ◆ Experts do not understand the dynamics of upper watershed loading on the DO problem in the DWSC. Algae originating from nearly 100 miles upstream may not actually reach the DWSC.
- ◆ The prohibition of all agricultural discharges into the San Joaquin River upstream of the DWSC would NOT cure the DO problem in the DWSC.
- ◆ Algae in the natural depth portion of the San Joaquin River produce oxygen by photosynthesis and help oxygenate the water.
- ◆ The unnatural depth of the DWSC kills algae in the River and turns oxygen producing live algae into oxygen demanding decaying algae.
- ◆ The artificial depth of the DWSC and the U.S. Army Corp of Engineers' (Corp of Engineers) decision to save money by building the channel in the middle of the San Joaquin River are the ultimate cause of the DO problem.

Recommendation.

The DWSC is the proximate cause of the low DO levels in the DWSC. Assessing any degree of responsibility on those who may contribute to algae growth is nonsensical and not supported by logic or science. The Regional Board has an obligation to assess responsibility on the party that has caused the problem and not to simply spread the pain to achieve political expediency. However, the Regional Board can and should take action to solve the DO problem in the DWSC.

Specifically the Regional Board should:

1. Force the Corp of Engineers to mitigate the impacts caused by the DWSC
 - a. Enforce the commitments made in the September 1980 EIS for the 35' excavation of the DWSC.
 - b. Prohibit further maintenance dredging of the DWSC until all DO impacts in the DWSC are mitigated by the Corp of Engineers.
 - c. Investigate alternative methods of motivating the Corp of Engineers to solve the DO problem in the DWSC, such as the enforcement of NPDES permit conditions for the 1980's dredging project. EPA has a legal responsibility to enforce NPDES requirements. The Regional Board should remind the EPA of this authority.
2. Allow time to complete studies currently being undertaken by the San Joaquin Valley Drainage Authority to help better understand the dynamic of algae in the River as they relate to loading in the DWSC and other related studies.
3. Allow time to complete aeration studies and the construction of an operable aerator as the ultimate solution to the DO problem in the DWSC. These projects are currently underway.

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4. Allow stakeholder time to develop a funding package for the operation of an aerator in the DWSC once cost estimates are established by aeration feasibility studies.

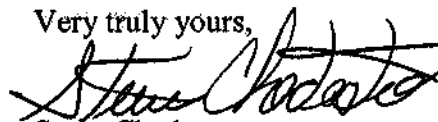
The Regional Board should NOT:

1. Allocate responsibility for solving the DO problem in the DWSC as outlined in the proposed Basin Plan Amendment and staff report.
2. Adopt a Basin Plan Amendment with little to no policy analysis of the fundamental issues.
3. Place responsibility for solving the DO problem in the DWSC on parties that are not the proximate cause of the problem simply because of perceived inadequate statutory authority of the Regional Board to compel the party (Corp of Engineers) actually responsible for causing the DO problem in the DWSC.

The Exchange Contractors are committed to resolving water quality problems in the region. We continually demonstrate this commitment by our actions. As part of the San Joaquin Valley Drainage Authority, we are undertaking extensive studies (totaling \$6.8 million) on the San Joaquin River to determine the dynamics of algae growth in the River. We plan to continue this proactive approach but adoption of this inequitable dissolved oxygen TMDL and Basin Plan Amendment will serve to undermine the credibility of the Regional Board and make it more difficult for growers in the Central Valley to embrace current and future water quality programs.

We ask the Regional Board to reject the simplistic allocation of responsibility proposed in the DO TMDL and Basin Plan Amendment, and, instead place the responsibility for solving the problems created by the construction of the Stockton Deep Water Ship Channel on those who made the decision to build the channel in the main stem of the San Joaquin River. The rest of the water users in the basin must be allowed to focus their limited resources on other water quality problems within the basin.

Very truly yours,



Steve Chedester

Executive Director

cc: San Joaquin River Exchange Contractors Water Authority Members
State Water Resources Control Board Members
Regional Water Quality Control Board Members
Senator Jeff Denham
Senator Charles Poochigian

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Senator Michael Machado
Congressman Dennis Cardoza
Congressman George P. Radanovich
Congressman Jim Costa
Congressman Richard Pombo
Congressman Devin Nunes
Assemblymember Barbara Matthews
Assemblymember Greg Aghazarian
Assemblymember Michael N. Villines
Assemblymember Nicole M. Parra
Assemblymember Juan Arambula
Assemblymember Dave Cogdill
Senator Dianne Feinstein
Mr. Daniel Nelson, San Joaquin Valley Drainage Authority
Mr. Allen Short, San Joaquin River Group Authority
San Joaquin River Resource Management Coalition
San Joaquin River Task Force